A

SBS EXPORTERS SDN BHD & ANOR

v.

TAMPIN RUBBER FURNITURE INDUSTRY SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[SUIT NO: D-22-625-2005]
6 SEPTEMBER 2010

C ***CIVIL PROCEDURE:*** *Pleadings - Issue not pleaded - Plaintiffs failing to plead for interest payments in their pleadings - Whether they could still claim for interest payments - Factors to consider - Effect of - Doctrine of merger - Whether applied*

D ***CONTRACT:*** *Formation - No written contract signed between parties - Plaintiffs making advance payments to 1st defendant for manufacture and sale of chairs - Plaintiffs stopped placing purchase orders with first defendant - Whether first defendant obliged to return to plaintiffs excess advance payments made*

E ***CONTRACT:*** *Formation - No written contract signed between parties - Plaintiffs making advance payments to first defendant for purchase and manufacture of chairs - Whether advance payments made to encourage or enable first defendant to extend its factory to cater for its intended increased production - Evidence adduced - Effect of - Plaintiffs stopped placing purchase orders with the first defendant - First defendant counterclaiming against the plaintiffs -*
F *Whether allowed*

CONTRACT: *Formation - No written contract signed between parties - Obligations in respect of each other - Evaluation of evidence - Effect of - Whether the relationship between plaintiffs and first defendant had been a partnership - Factors to consider*

G

CONTRACT: *Guarantee - Guarantor - Second and third defendants not denying being guarantors to first defendant - Whether they were liable for indebtedness of first defendant*

H ***EVIDENCE:*** *Adverse inference - Evidence Act 1950, s. 114(g) - Whether applicable - Failure of third defendant to testify for first defendant despite being in court during trial - Relationship between first and third defendants - Effect of - Evidence Act 1950, s. 114(g)*

I The plaintiffs' claim against the first defendant was for the excess of advance payments made by the plaintiffs to the first defendant for the purchase of furniture to be manufactured by the first defendant and as against the second and third defendants, as guarantors of the first defendant. At all material times, the relationship between the plaintiffs

and the first defendant had been that of buyer and seller. No written contract was entered into between the plaintiffs and the first defendant. The first defendant counterclaimed for general damages together with interests and costs for breach of contract by the plaintiffs for failing to take delivery of the Chelsea chairs ('chairs'). The chairs were subsequently sold as scrap metal and a certain sum was recouped by the first defendant. There were five main issues that arose for consideration before this court: (i) whether the relationship between the plaintiffs and the first defendant had been that of a partnership; (ii) whether the first defendant had been obliged to repay the plaintiffs the advanced sums inclusive of interest; (iii) whether the second and third defendants as guarantors for the first defendant had been obliged to repay the sums claimed by the plaintiffs; (iv) whether there had been an oral agreement between the plaintiffs and the first defendant to the effect that the advances that had been made had been made to enable the first defendant to expand his business and to construct a new factory for the manufacture of the chairs; (v) whether the plaintiffs had ordered 10,000 units of the chairs from the first defendant.

Held (allowing plaintiffs' claim):

(1) The business relationship between the plaintiffs and the first defendant had been that of purchaser and seller only. The relationship between them had not been one of partnership under the law. Although initially the business relationship between the plaintiffs and the 1st defendant had been very close, it had not amounted to a partnership between them. (para 21)

(2) The first defendant had manufactured and sold furniture to the plaintiffs according to the purchase orders placed by the plaintiffs. The sum claimed by the first plaintiff had been for the balance of the advance payments made to the 1st defendant together with interest paid to the bank and the second plaintiff's claim had been for the balance of the excess advance payments made to the first defendant. The plaintiffs had stopped placing further purchase orders for the furniture after 2002 and as such, the first defendant had been obliged to return the excess advance payments. (para 22)

(3) Notwithstanding the fact that there had not been a separate claim by the first plaintiff in its statement of claim for interest due and payable, the defendants had been obliged to pay the interest sum to the first plaintiff on the basis that the said sum had merged with the excess advance payments as at the date of the statement of claim, to form the claim by the first plaintiff. The doctrine of

merger had applied in this case in that the principal sum claimed by the first plaintiff had merged with the interest charges payable into the judgment debt. Hence, there had not been a requirement for the first plaintiff to have specifically pleaded for the claim for interest charges. Furthermore, at all material times, the first defendant had not disputed the claim for the payment of interest charges as shown in the first plaintiff's statement of accounts. The issue of the first plaintiff unilaterally imposing interest to be paid by the defendants had only been raised at the trial. The defendants, at all material times, had known of the interest charges. (paras 23-24 & 26)

(4) In the event the doctrine of merger had not applied in this case, on the basis of a lack of pleadings of a material issue in the statement of claim, on the authority of the Federal Court case of *KEP Mohamad Ali*, the defendants in this case could not be said to have been taken by surprise and could not deny the plaintiffs their claim by reason of a lack of pleading a fact already known to them, as to do so would amount to a denial of justice. Further, the interest charges payable by the 1st defendant to the plaintiffs had not been for the plaintiffs' benefit alone. It had been charges the plaintiffs had had to pay to the bank in order to secure the credit facilities for the first defendant. (para 27)

(5) The balance of the advance payments claimed by the first plaintiff had not been made to encourage or enable the first defendant to extend its factory to cater for the first defendant's intended increased production. (para 28)

(6) In so far as the manufacture and supply of the Chairs had been concerned, the plaintiffs had in fact placed an order for the manufacture of about 10,000 chairs by the 1st defendant but had failed to take delivery of them. DW2's evidence that if not for the order placed by the 1st plaintiff, the 1st defendant would not have manufactured the same as it had been a new line of business for them, was accepted. Thus, the 1st defendant's counterclaim was allowed. (para 31)

(7) The 1st plaintiff's claim had not been satisfactorily rebutted by the 1st defendant. An adverse inference would be drawn against the defendants pursuant to s. 114(g) of the Evidence Act for the third defendant's (who had been a guarantor and a Director of the first defendant) failure to give evidence on behalf of the first defendant or himself, with no explanation being proffered for his failure to do so, despite him being in court during the trial. (para 33)

(8) Pursuant to letters of guarantee, the second and third defendant had agreed to stand as guarantors for the first defendant. As the second and third defendants had not denied being the guarantors, they would be held liable for the indebtedness of the first defendant. (para 34)

[Plaintiffs further ordered to pay first defendant balance sum owing in respect of sale and purchase of the chairs.]

Case(s) referred to:

Chia Ah Sng v. Hong Leong Finance Limited [2001] 1 SLR 591 ***(refd)***

Guthrie Sdn Bhd v. Trans - Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

HSBC Bank Malaysia Berhad v. LH Timber Products Sdn Bhd & Ors [2005] 8 CLJ 249 HC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd [2003] 4 CLJ 270 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiff - Lee Kok Heng (Nirmal Jeet Kaur with him); M/s Lee Kok Heng & Co

For the defendant - George Proctor (Rafik Rahim with him); M/s YS Woo & Proctor

Reported by Sharmini Pillai

JUDGMENT

Mah Weng Kwai JC:

The Claim

[1] By the statement of claim dated 4 May 2005, the 1st and 2nd plaintiffs claimed the sum of RM627,588.85 and the sum of RM177,853.79 respectively as at November 2002 against the 1st defendant being advance payments made for the purchase of furniture to be manufactured by the 1st defendant and against the 2nd and 3rd defendants as guarantors of the 1st defendant. The sums claimed by the plaintiffs were the sums advanced by the plaintiffs in excess of the purchase of the furniture from the 1st defendant. The plaintiffs contended that the sums claimed from the 1st defendant were being unlawfully withheld by the 1st defendant.

[2] The advances were made by the plaintiffs by way of letters of credit to the 1st defendant to set off against the purchase price of the furniture.

[3] By a letter of guarantee dated 15 January 2002, the 2nd and 3rd defendants as directors of the 1st defendant guaranteed to pay the plaintiffs on demand all monies due and owing by the 1st defendant to the plaintiffs up to the sum of RM1,500,000 together with interests, if any.

[4] At all material times the relationship between the plaintiffs and the 1st defendant was that of buyer and seller and not that of a partnership.

[5] No written contract was entered into between the plaintiffs and the 1st defendant.

[6] At all material times the 1st defendant sold and supplied furniture to the plaintiffs based on the orders made by the plaintiffs (see para. C of agreed statement of facts).

[7] The plaintiffs were obliged to pay interest charges to the bank for the issuance of the letters of credit in favour of the 1st defendant. The plaintiffs' claim for the interests paid to the bank was debited against the 1st defendant in the debit notes issued by the plaintiffs to the 1st defendant from time to time, particulars of which were within the knowledge of the 1st defendant.

The Defence And Counter-claim

[8] The 1st defendant claimed that since June 1999, the business relationship between the plaintiffs and the 1st defendant was that of a partnership and as such the 1st defendant is not indebted to the plaintiffs for the alleged advances made.

[9] The 1st defendant admitted that upon the sale and delivery of the furniture to the plaintiffs, the plaintiffs would cause letters of credit to be issued in favour of the 1st defendant.

[10] Due to the increase of purchase orders by the plaintiffs, the 1st defendant was financially constrained and requested the plaintiffs to make advance payments to the account of furniture to be purchased by them. It was agreed that the 1st defendant could set off the purchase price of the furniture to be manufactured against the money advanced by the plaintiffs.

[11] The 1st defendant claimed that the plaintiffs had requested the 1st defendant to manufacture and supply chairs made out of wrought iron known as "Chelsea" chairs. The 1st defendant also claimed that in 2000,

the plaintiffs had insisted that the 1st defendant build a special factory for the production of the Chelsea chairs after assuring the 1st defendant that they would place substantial orders for the said chairs.

[12] Based on the representations made by the plaintiffs and in view of the business relationship as partners, the 1st defendant produced about 8,000 Chelsea chairs for the plaintiffs.

[13] The 1st defendant on realising that the plaintiffs had stopped placing orders for furniture, refused to refund moneys advanced by the plaintiffs as demanded.

[14] The 1st defendant in its counter-claim claimed for general damages together with interests and costs for breach of contract by the plaintiffs for failing to take delivery of the Chelsea chairs.

[15] In December 2007, 8,388 Chelsea chairs were sold as scrap metal by the 1st defendant to DW1, Mohamed Aslam bin Gelam Nabib for the sum of RM20,970 at RM2.50 each.

Issues To Be Decided By The Court

[16] The main issues to be decided by the court were *inter alia*:

(a) Whether the relationship between the plaintiffs and the 1st defendant was that of a partnership.

(b) Whether the 1st defendant was obliged to repay to the 1st plaintiff the sum of RM627,588.85 inclusive of interests and to the 2nd Plaintiff the sum of RM177,853.79 being advance payments respectively received as at November 2002.

(c) Whether the 2nd and 3rd defendants as guarantors for the 1st defendant were obliged to repay the sums claimed by the plaintiffs.

(d) Whether there was an oral agreement between the plaintiffs and the 1st defendant that the advances made were for the 1st defendant to expand its business and to construct a new factory for the manufacture of Chelsea chairs.

(e) Whether the plaintiffs had ordered 10,000 units of Chelsea chairs from the 1st defendant.

Decision Of The Court

[17] Upon the full trial of the case and after considering the evidence of the plaintiffs' four witnesses and the defendants' two witnesses and the submissions of counsel, the court made the following orders:

(a) The defendants to pay the 1st plaintiff the sum of RM627,588.85 being excess advance payments received inclusive of interest charges.

(b) The defendants to pay the 2nd plaintiff the sum of RM27,502.86 being advance payments received.

(c) The plaintiffs to pay the 1st defendant the sum of RM279,030 being the balance sum owing in respect of the sale and purchase of Chelsea chairs.

(d) The plaintiffs' claim and defendants' counter-claim were allowed with interests from date of judgment to full payment.

(e) Each party to bear its own costs.

Reasons For Decision

[18] At all material times the plaintiffs were trading companies in furniture, taking orders from buyers mainly in Europe and placing the purchase orders with local manufacturers. The 1st defendant was one of the local manufacturers that the plaintiffs dealt with.

[19] The plaintiffs had agreed to make advance payments to the 1st defendant even before purchase orders were placed so as to enable the 1st defendant to buy raw materials in advance and to give priority to the manufacture of furniture ordered by the plaintiffs. The advances made were to ensure prompt and timely delivery of the manufactured products to the plaintiffs' customers. Ooi Sim Ghee (DW2) in his cross-examination admitted that the plaintiffs had made advance payments even before the manufacture of furniture had commenced. In fact, DW2 admitted there were advance payments which were not utilized and remained as advances in the 1st defendant's account.

[20] The plaintiffs in order to pay the 1st defendant applied to the bank for the issuance of letters of credit. Obviously, to enjoy this facility, the plaintiffs had to pay bank charges inclusive of interests to the bank.

[21] From the evidence of Yeap Cheng Teik (PW1), Yap May Sim (PW2) and DW2, I found as a matter of fact that the business relationship between the plaintiffs and the 1st defendant was that of purchaser and seller only. The relationship between them was not one of a partnership under the law. Although initially the business relationship between the plaintiffs and the 1st defendant was very close, this did not amount to a partnership (not even a loose partnership) between them for the following reasons:

(a) no attempt was made to register the business as a partnership with the registry of businesses.

(b) the accounts of the plaintiffs and the 1st defendant were prepared and kept separately and were not shown to each other.

(c) there was no agreement or provision for any sharing of profits by the plaintiffs in the 1st defendant's business or *vice versa*.

(d) although the plaintiffs had stationed a quality controller at the 1st defendant's factory, he was not based at the factory full time and had remained an employee of the plaintiffs.

(e) although DW2 had claimed in his evidence that the 1st defendant had manufactured the furniture exclusively for the plaintiffs, this contention was denied by PW1 and the 1st defendant had failed to tender any evidence to prove its case.

(f) although there were discussions between PW1 and DW2 from time to time on the possibility and intention of parties to carry on business jointly and a draft Memorandum of Understanding (MOU) was prepared (see exh. D1 - bundle C pp. 88 - 97) no signed copy of the MOU was tendered in evidence by DW2. A perusal of exh. D1 will show that the MOU was to have been entered between PW1 and DW2 personally and not between the plaintiffs and the 1st defendant. No explanation was given by DW2 as to why the MOU was to be entered into between PW1 and DW2 as individuals and not between the respective companies. Exhibit D1 is undated although the year 1999 appears on the cover page. According to DW2 the negotiations to enter into a MOU were held in 2001 but no explanation was given as to why exh. D1 had the year 1999 stated on the cover page. DW2 in his evidence claimed that he had signed a copy of the MOU which was then handed to one Felix Yap for the execution by PW1 and stamping. However, the signed copy was not returned by either Felix Yap or PW1 to DW2. Since the defendants intended to rely on the MOU, the defendants should have taken steps to at least apply for the discovery of the MOU by the plaintiffs or to call Felix Yap as their witness. The defendants did neither.

(g) PW1 had denied execution of the fair copy of the MOU. As it was DW2 who had claimed that there was a partnership formed pursuant to the MOU, it was incumbent on the 1st defendant to produce the signed copy of the MOU as evidence in court. In any event DW2 had confirmed in his cross-examination that the proposed joint venture never took off the ground as no business was carried out

under it at all. In fact DW2 stated that the joint venture collapsed in 2001. That being so, there was no partnership to speak of between the plaintiffs and the 1st defendant.

(h) there was no evidence of any confirmed oral agreement between PW1 and DW2.

[22] It was a finding of the court that the 1st defendant had manufactured and sold furniture to the plaintiffs according to the purchase orders placed by the plaintiffs and that the sum claimed by the 1st plaintiff was for the balance of advance payments made to the 1st defendant together with interests paid to the bank and the sum claimed by the 2nd plaintiff was for the balance of the excess advance payments only made to the 1st defendant. The plaintiffs had stopped placing further purchase orders for furniture after 2002 and as such the 1st defendant was obliged to return the excess advance payments.

[23] The defendants complained that as the 1st plaintiff did not plead for the payment of interests in its statement of claim, the 1st plaintiff ought not to be allowed the claim for interests. It was the finding of the court however, that notwithstanding there was no separate claim by the 1st plaintiff in its statement of claim for interests due and payable, the defendants were obliged to pay the interest sum of RM250,331.25 to the 1st plaintiff on the basis that the said sum had merged with the excess advance payments as at the date of the statement of claim to form the claim of the 1st plaintiff.

[24] I am of the view that in this case the doctrine of merger applies in that the principal sum claimed by the 1st plaintiff merged with the interest charges payable (ie, the pre-judgment interests) into the judgment debt. This was so stated by Abdul Malik Ishak, J (now JCA) in the case of *Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd* [2003] 4 CLJ 270 when His Lordship in reviewing the Singapore case of *Chia Ah Sng v. Hong Leong Finance Limited* [2001] 1 SLR 591 held that "the principal and the pre-judgment interests, both merge into the judgment debt. Statutory interest then runs on the judgment debt comprising of both the principal and pre-judgment interests." Hence, there was no requirement for the 1st plaintiff to plead specifically for the claim for interest charges.

[25] The grounds for applying the doctrine of merger are as follows:

(a) The claim for interest in the debit notes was considered as part and parcel of the 1st plaintiff's claim. The debit notes were considered as integral documents governing the business relationship between the 1st plaintiff and the 1st defendant.

(b) The court disagreed with DW2 that the interests payable had been unilaterally imposed by the 1st plaintiff. At all material times, the defendants knew that the interests were due and payable. This is evidenced by the claim for interests in the debit notes issued by the 1st plaintiff to the 1st defendant which had acknowledged that interest was payable to the 1st plaintiff.

(c) The debit notes had in fact been certified by the 1st defendant's auditor to be correct.

(d) PW1 in his evidence tendered a bundle of debit notes issued by the 1st plaintiff (see exh. P33 - bundle P pp. 4 to 42) to the 1st defendant in respect of charges for *inter alia*, shipment, forwarding, freight, fumigation, courier, banking, fabric, transport and interests for advance payments. In particular, exh. P33 - bundle P pp. 35 to 42 comprised of debit notes from April 2001 to July 2001 which specifically referred to interest charges for advance payments with a statement on the "analysis of interests" attached to each debit note.

(e) All the above debit notes were issued to the 1st defendant which had forwarded them to its Auditors Messrs TCMK Associates for verification. Most of the debit notes exhibited and in particular, the debit notes with the attached statement of analysis of interests in exh. P33 - bundle P pp. 35 to 42 bore the stamp which read "Messrs TCMK Associates Examined".

(f) As the debit notes were issued to the 1st defendant in 2001, the court did not accept the evidence of DW2 when he said that he only knew about the interest charges when he saw the debit notes in exh. P33 - bundle P pp. 35 to 42 in court during the trial. As the said debit notes bore the chop of the 1st defendant's auditor, the court could easily arrive at a conclusive finding that the 1st defendant must have known of the interest charges in 2001 itself.

(g) The debit notes had been attached to affidavits filed in the plaintiffs' application for summary judgment in July 2003. As such, it will be incorrect and untrue for DW2 to say that he had no knowledge of the debit notes until the day of hearing on 6 May 2010.

(h) The defendants have themselves exhibited the debit notes in respect of interest charges by the plaintiffs in their own bundle of documents (see bundle C - pp. 69 to 84). This bundle was filed by counsel for the defendants on 14 July 2009, which goes to show that the defendants must have had knowledge of the debit notes in 2009 and it is improper for DW2 to say that he had not seen the debit notes until the date of trial.

(i) The 1st plaintiff had by its letter dated 1 November 2007 informed the 1st defendant that there was an outstanding account of RM1,507,270.79 which was inclusive of interest charges. The 1st defendant duly acknowledged that the account was true and correct by signing on the said letter (see exh. P29 - bundle B p. 32).

[26] It is also important to note that at all material times, the 1st defendant did not dispute the claim for payment of interest charges which was shown in the 1st plaintiff's monthly statement of accounts. The issue of the 1st plaintiff unilaterally imposing interests to be paid by the defendants was only raised at trial.

The 1st plaintiff has exhibited the statements of account as at 30 August 2001, 30 August 2002 and 30 September 2002 in exh. P9 - bundle D pp. 13 to 15, which show the sum due and payable by the 1st defendant on the respective dates. These statements of account include the sum payable by way of interest. The court found as of fact that the defendants knew of the interest charges at the material time as DW2 had in his own hand writing amended the 1st plaintiff's figures shown in exh. P9 - bundle D at p. 15. DW2 had also signed off on the statements of account at pp. 14 and 15.

[27] In the event it is held that the doctrine of merger does not apply in this case, on the lack of pleading of a material issue in the statement of claim, the Federal Court in the case of KEP *Mohamad Ali v. KEP Mohamad Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10 held that although the acknowledgment of the debt was not pleaded in the statement of claim, the case had been satisfactorily presented and developed in the proceedings before the High Court and there were materials on the record from which a decision to that effect could be arrived at. At p. 12 Raja Azlan Shah CJ (Malaya) (as his Highness then was) said:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

Similarly, in the present case it cannot be said that the defendants have been taken by surprise and to deny the plaintiffs their claim by reason of lack of pleading in the statement of claim of a fact already known to the defendants will amount to a denial of justice. It must also be remembered that the interest charges payable by the 1st defendant to the plaintiffs were not for the plaintiffs' benefit themselves. They were charges which the plaintiffs had to pay to the bank to secure the credit facilities for the 1st defendant.

[28] It was also a finding of fact by the court that the balance of the advance payments claimed by the 1st plaintiff was not made to encourage or enable the 1st defendant to extend its factory to cater for the 1st defendant's intended increased production. If the construction of the new factory was at the behest of the 1st plaintiff, then the evidence necessary to prove this was wholly lacking on the part of the 1st defendant. No evidence of any written agreement, drawings or plans for the construction of the factory, the cost of construction and the time required for its completion was adduced in court. What was alleged by DW2 sadly remained a mere allegation. See the case of *HSBC Bank Malaysia Berhad v. LH Timber Products Sdn Bhd & Ors* [2005] 8 CLJ 249 where Abdul Malik Ishak, J (now JCA) at p. 258 held that (*albeit* in an application for summary judgment), a bare denial by the defendant of its indebtedness is not enough. The defendant has to provide an explanation as to why he is not so indebted.

[29] DW2 in his evidence alleged that the 1st plaintiff had made three advances of RM500,000 each for the purpose of constructing a new factory. Unfortunately, DW2 was not able to produce any evidence to support his statement. PW1 in his statement had denied making any advance payments to the 1st defendant for the purpose of construction of a new factory.

[30] The 1st defendant also claimed that part of the advance payments was used to pay for the rental of four industrial lots which had been leased by the 1st defendant to cater for the expected increase in the production of furniture for the plaintiffs. Sadly, besides the bare statement of DW2 in evidence, no tenancy agreement or receipts for rental paid was produced.

[31] Insofar as the manufacture and supply of the Chelsea chairs was concerned, it was the finding of the court that the plaintiffs did in fact place an order/s for the manufacture of about 10,000 chairs by the 1st defendant but had failed to take delivery of them. In his evidence, PW1 had acknowledged that the plaintiffs had only taken delivery of 1588 chairs (see exh. P35) for which the plaintiffs had paid. Although the 1st defendant in its counter-claim did not plead for special damages but only claimed for general damages to be assessed, DW2 in his evidence in court had stated that the sum claimed for the Chelsea chairs produced but not taken by the plaintiffs was RM800,000.

DW2 in his evidence on the counter-claim claimed for the sum of RM800,000 being the cost of 8000 Chelsea chairs at RM100 each. Although there was no purchase order placed by the 1st plaintiff the court accepted the evidence of DW2 that if not for the order by the 1st plaintiff, the 1st defendant would not have had manufactured the same

as this was a new line of business for them. However, apart from stating that the claim was at RM100 per chair, no details were given by DW2 to support this claim.

In para. 10 of the defence and counter-claim, the 1st defendant had averred that the chairs were worth "more than RM300,000" only. Nowhere in the defence and counter-claim was it pleaded that the value of the chairs was RM800,000. The value of the chairs was also stated to be about RM300,000 in the 1st defendant's affidavit in reply to the plaintiff's application for summary judgment. In any event, counsel for the defendants in his oral submissions had submitted that the counter-claim was for RM300,000. Thus, as the plaintiffs were in breach and taking the lower figure of RM300,000 to be correct, the court allowed the 1st defendant's counter-claim in the sum of RM279,030 being RM300,000 less the scrap value of RM20,970 paid by DW1. The court having allowed judgment to the 1st defendant for the sum of RM279,030 cannot understand the purport of the defendants' appeal insofar as the quantum of the counter-claim is concerned.

[32] Although the 2nd plaintiff had claimed for the sum of RM117,853.79 against the 1st defendant initially, counsel for the 2nd plaintiff conceded that the sum of RM27,502.86 as stated in the plaintiffs' auditor's report (see exh. P31 - bundle W pp. 1 to 27 at p. 23) was the correct amount to be paid by the 1st defendant.

[33] It was the court's finding that the claim by the 1st plaintiff had not been satisfactorily rebutted by the 1st defendant. An adverse inference was drawn against the defendants pursuant to s. 114(g) of the Evidence Act when the 3rd defendant, a guarantor and director of the 1st defendant, who was in court during the trial did not give evidence on behalf of the 1st defendant or of himself and no explanation was proffered to the court for his failure to do so.

In the Federal Court case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 at 399, Gopal Sri Ram FCJ had the occasion to say that where a respondent being a party to the action provides no reasons as to why he did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans - Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155. See also, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509.

[34] Pursuant to the letters of guarantee dated 15 January 2002, the 2nd and 3rd defendants agreed to stand as guarantors for the 1st defendant. As the 2nd and 3rd defendants did not deny they were the guarantors, they were therefore held liable for the indebtedness of the 1st defendant.

[35] Counsel for the defendants in his submission contended that the plaintiffs ought to have produced all the purchase orders issued by them and that failure to do so would mean that the plaintiffs had not proven their case. It will be noted however, that DW2 had stated that all the 1st defendant's invoices were issued personally by him and that if there was no purchase order, he would not issue any invoice. That being the case and as DW2 had invoiced for all the furniture manufactured by the 1st defendant, this could only mean that the plaintiffs had issued their purchase orders to the 1st defendant.

[36] The findings of the court in this case were based almost entirely on the facts, in particular the accounts kept by the plaintiffs. I found that the accounts kept by the plaintiffs were satisfactory and self-explanatory. On the other hand, the defendants had hardly any accounts of their own to rely on. In fact DW2 admitted that the accounts of the 1st defendant were not in order whereas the accounts of the plaintiffs were in order.

[37] In the result, judgment was entered for the 1st plaintiff in the sum of RM627,588.85 which was inclusive of the interest charges of RM250,331.25 as per the 1st plaintiff's supplier ledger report as at 30 November 2002 shown in exh. P9 (see bundle D pp. 1 to 23 at p. 12) and judgment in the sum of RM27,502.86 was entered for the 2nd plaintiff.